

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WILLIAM L. MILLER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 152,429
<b>FLEXEL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>HOME INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND )</b>		

**ORDER**

**ON** the 2nd day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge James R. Ward, on October 28, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

Claimant appeared by his attorney, Michael J. Unrein, of Topeka, Kansas. Respondent and insurance carrier appeared by their attorney, John D. Jurcyk, of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Anthony D. Clum, of Topeka, Kansas. There were no other appearances.

**RECORD**

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

**STIPULATIONS**

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

**ISSUES**

- (1) Whether claimant met with personal injury by accident in April or May, 1989, and in a series of accidental injuries through September, 1989.
- (2) If so, whether claimant's accidental injuries arose out of and in the course of his employment.
- (3) Whether respondent had notice of claimant's alleged accidental injuries.
- (4) If not, whether respondent was prejudiced by claimant's failure to properly notify the employer and the respondent.
- (5) Whether claimant properly served upon respondent written notice for compensation.
- (6) Claimant's average weekly wage.
- (7) Claimant's entitlement to temporary total disability benefits.
- (8) Claimant's entitlement to reimbursement for medical expenses.
- (9) Unauthorized medical.
- (10) Future medical.
- (11) Nature and extent of claimant's disability.
- (12) Amount of compensation due.
- (13) The liability of the Kansas Workers Compensation Fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The first issue that the Appeals Board will address in this case is whether or not a written claim for compensation was timely served upon the respondent pursuant to K.S.A. 44-520a. This is the controlling issue and the Appeals Board finds and concludes that the claimant did not serve a timely written claim for compensation upon the respondent as required by K.S.A. 44-520a, for his accidents of May 8, 1989, and September 18, 1989.

The Kansas Workers Compensation Act requires the employee to notify the employer of an accident within ten (10) days after the date of accident, K.S.A. 44-520, and to further serve upon the employer a written claim for compensation within two-hundred (200) days after the date of the accident, or within two-hundred (200) days after the date of the last payment of compensation. If the employer fails to file an accident report with the director after the injured employee has given notice of such accident, then the two-hundred (200) day time limit to serve a written claim is extended to one (1) year from the date of such accident, suspension of payment of disability compensation or the date of the last medical treatment authorized by the employer. K.S.A. 44-557(a),(c).

The claimant in the instant case argues that the "Hospital Notice" admitted as Claimant's Exhibit No. 1 in the deposition of Douglas E. Lowe, a fellow employee of the claimant's on May 9, 1989, the date of the claimant's alleged accident, satisfies the written claim requirement of K.S.A. 44-520a. This "Hospital Notice" was filled out by the claimant's supervisor, Joe Scribner, as a result of the claimant giving notice of an accident. Such notice contained the date of the accident, time of the accident, foreman's name, employee's name, employee's description of accident, description of injury and whether the employee returned to regular work, light work, or went to a doctor or nurse for medical treatment.

The case of Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973), is cited by the claimant as holding that a written claim need not take any particular form so long as its purpose is to make a claim for workers compensation benefits. Whether an instrument is a written claim for compensation and whether such claim is timely filed is a question of fact. Ours v. Lackey, *supra*, at 78. It is the intentions of the parties that determines what constitutes a written claim. Fitzwater v. Boeing Airplane Co., 181 Kan. 158, 166, 309 P.2d, 681 (1957).

The claimant established that his supervisor filled out the "Hospital Notice" as a result of his giving notice of the accident which occurred on May 9, 1989. He did not request the employer to provide workers compensation benefits for either the injury which occurred on May 9, 1989, or the injury which occurred on September 18, 1989. Medical benefits were submitted by the claimant to the health insurance carrier of the employer, Blue Cross/Blue Shield, and the claimant was paid full pay as disability benefits for six months, and then the balance of the time the claimant was off work he was compensated by a long-term disability policy he purchased through his employer. The claimant signed claim forms for these benefits and stated on these forms that his injury was not work-connected. The claimant did not tell any of his treating doctors that his back injury was caused by an accident that occurred at work. The claimant never served a written claim for workers compensation benefits upon the respondent until he retained an attorney to represent him. The claimant's present employer is Flexel, Inc., who purchased the Tecumseh plant where the claimant presently works from DuPont. The claimant made a written claim for back problems in the early 1960's when DuPont owned the plant. He was allegedly told at that time by someone within the DuPont management that DuPont would not pay workers compensation benefits. Three current production supervisors and the safety, health and security supervisor of the respondent established that the purpose of the "Hospital Notice" was simply a procedure established to report all employee accidents and not to claim workers compensation benefits.

The Appeals Board having reviewed and considered the whole evidentiary record in this case, finds and concludes that the parties did not intend the "Hospital Notice" to be a written claim for compensation as contemplated by K.S.A. 44-520a. The Appeals Board further finds and concludes that the claimant had one year from the date of claimant's second accident of September 18, 1989, to serve a written claim for compensation upon the respondent but did not do so until January of 1991. Therefore, no timely written claim was served upon the respondent pursuant to K.S.A. 44-520a, for the accidents of September 18, 1989 and May 9, 1989.

The claimant goes on to argue that the respondent's predecessor, DuPont, made every effort to thwart the filing of workers compensation claims and such actions should be imputed to the respondent. However, the Appeals Board in reviewing the whole evidentiary record of this case does not find any credible evidence that the respondent, Flexel, Inc., has taken actions to keep employees from filing workers compensation claims. The Appellate Courts in construing K.S.A. 44-520a over the years have taken into consideration the facts and circumstances surrounding each individual case, including the actions of the employer. See Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988); Ours v. Lackey, *supra*, and Fitzwater v. Boeing Airplane Co., *supra*. However, in this case there is simply no evidence that the present employer's actions had a designed purpose to discourage employees from filing workers compensation claims. Even though the courts over the years have liberally construed the written claims statute in favor of bringing the injured worker under the provisions of the act, the facts and the circumstances in this case do not support a finding that the claimant served a timely written claim upon the employer as required by K.S.A. 44-520a.

(2) The Appeals Board further adopts and incorporates herein the findings of Administrative Law Judge James R. Ward as set forth in his Award dated October 28, 1993, to the extent that they are not inconsistent with the findings and conclusions expressed in this order.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward, dated October 28, 1993, is affirmed in all respects and an award of compensation in favor of the claimant, William L. Miller, and against respondent, Flexel, Inc., and its insurance carrier, Home Insurance Company, is hereby denied.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid direct as follows:

APPINO & ACHTEN REPORTING SERVICE	\$ 584.40
CURTIS, SCHLOETZER, HEDBERG, FOSTER AND ASSOCIATES	\$ 221.36

METROPOLITAN COURT REPORTERS, INC.

\$ 332.60

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 1993.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Michael J. Unrein, Attorney at Law, P.O. Box 3555, Topeka, Kansas 66601  
John D. Jurcyk, Attorney at Law, P.O. Box 14548, Lenexa, Kansas 66285  
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James R. Ward, Administrative Law Judge  
George Gomez, Director